ATTORNEY FOR APPELLANT:

KAREN C. HORSEMAN
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JERRY FRANKLIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0308-CR-719
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick Murphy, Commissioner
Cause No. 49G14-0210-FD-246044

April 30, 2004

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE[1]

Jerry Franklin appeals his conviction for dealing in marijuana as a class A misdemeanor.

We affirm. [2]

ISSUES

Whether Franklin's conviction is supported by sufficient evidence.

FACTS

Franklin had a relationship with Michelle Luper for about five years; they lived together "on and off" at her residence in Indianapolis until their relationship ended in October of 2002. (Tr. 5). On September 30, 2002, Franklin and Luper had an argument about Franklin growing marijuana plants on the premises of her residence. Luper called an attorney to inquire about what could happen to her if she reported the marijuana that Franklin had in her residence. Shortly thereafter, she went to the prosecutor's office. There, she met with an officer of the Indianapolis Police Department, and she "told him about the marijuana plants" and that they belonged to Franklin. (Tr. 12).

After Luper signed permission for a search, officers went to Luper's residence. In response to their knock, Franklin opened the door and let them in. They found "several marijuana plants, chemicals, and lights used to grow marijuana indoors." (Tr. 22). The

[1] On April 14, 2003, we held oral argument in this case at Arsenal Technical High School. We wish to thank counsel for their thoughtful presentations. We also wish to thank the school staff and the students for their preparations and attentiveness.

[2] Franklin was also charged with and convicted of possession of marijuana, as a class D felony. At sentencing, the class D felony possession of marijuana charge was merged into the class A misdemeanor dealing marijuana charge. The conviction for dealing in marijuana as a class A misdemeanor is affirmed; however, the cause is remanded for resentencing for the class A misdemeanor instead of a class D felony and correction of the abstract of the judgment accordingly.

plants were in the garage and the computer area. Some plants were 3-4 feet tall, and some were "very small . . . in the little foam things that they begin growing them in." (Tr. 24). Tests revealed the plants to be 1,268 grams of marijuana.

On October 1, 2002, the State charged Franklin with one count of dealing in marijuana, as a class A misdemeanor. On March 18, 2003, Franklin was tried in a bench trial. Luper and Officer Michael Elder of I.P.D. testified to the foregoing. Luper also testified that Franklin was living with her in "late September of 2002," and that during their relationship, Franklin kept clothes and personal items at her residence. (Tr. 7). She further testified that she had witnessed Franklin tending the marijuana plants, fertilizing and watering them. In addition, Luper testified that she had once sent a letter to the house purporting to be from her landlord and indicating a forthcoming inspection because she wanted Franklin "to move [the marijuana plants] out." (Tr. 9). Franklin's reaction was to move the marijuana plants from the bedroom to the garage and the computer area.

The trial court took the matter under advisement and reviewed the law concerning constructive possession. On April 1, 2003, it held that there was "sufficient evidence to find him guilty of possession and dealing." (Tr. 37).

DECISION

On appeal, Franklin argues that the evidence was insufficient to prove that he constructively possessed the marijuana plants growing in Luper's house and garage.[3] We disagree.

[3] Franklin's motion to amend his Appellant's Brief is granted. However, the request to withdraw all copies in order to insert the correction is denied as unnecessary, inasmuch as the motion with the amendment set out therein is sufficient in this instance.

"In reviewing a claim of insufficient evidence, we will affirm the conviction unless, considering only the evidence and reasonable inferences favorable to the judgment and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Dunlap v. State, 761 N.E.2d 837, 839 (Ind. 2002). Possession of an illicit substance can be proven by actual or constructive possession. Person v. State, 764 N.E.2 743, 750 (Ind. Ct. App. 2002). To demonstrate constructive possession, the State must prove that the defendant had both the intent and the capability to maintain dominion and control over the contraband. White v. State, 772 N.E.2d 408, 413 (Ind. 2002). To prove intent, the State must show the defendant's knowledge of the presence of the contraband. Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999). To prove the capability to maintain dominion, the State must demonstrate that the defendant had the ability to reduce the item to his personal possession. Iddings v. State, 772 N.E.2d 1006, 1015 (Ind. Ct. App. 2002), trans. denied.

Luper testified that during the year 2002, Franklin split his time living either in Lafayette or with her at her residence in Indianapolis "depending upon when [they] were fighting." (Tr. 6). When Luper was questioned regarding her certainty that the marijuana plants were Franklin's she replied, "There was nobody else there." (Tr. 8). Further, Luper testified that she saw Franklin watering and fertilizing the plants. Then, when Luper sent the letter regarding the inspection of her home, Franklin moved the plants from the bedroom to the garage and the computer desk. The evidence was sufficient to demonstrate that Franklin knew of the marijuana plants and maintained dominion and

control over the plants. Thus, the evidence demonstrated that he constructively possessed the contraband.[4]

As part of his argument that the evidence was not sufficient, Franklin contends that his conviction should be reversed pursuant to the incredible dubiosity rule. In this regard, Franklin urges that Luper's testimony was not worthy of credit because she testified that she fabricated a portion of the version of the events that she initially gave the police.

Pursuant to the narrow limits of the "incredible dubiosity" rule, a reviewing court may infringe upon a jury's function to determine the credibility of witnesses. Dillard v. State, 755 N.E.2d 1085, 1089 (Ind. 2001). Application of the rule to reverse a conviction is limited to the circumstances where a sole witness presents inherently improbable testimony and the conviction is not supported by any circumstantial evidence. Id. "[I]nherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony . . . ." is that which "is so incredibly dubious . . . that no reasonable person could believe it." Id. (citations omitted).

Initially, Luper told the police that Franklin struck her. Later at trial, she recanted that portion of the story and testified that she had been "mad" when she told both the untruthful and truthful portions of the events leading to Franklin's arrest.[5] (Tr. 12). However, Luper also testified that she told the truth regarding Franklin's ownership of the marijuana plants. (Tr. 12-13).

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[4] At trial, Franklin stipulated that the amount of contraband was sufficient to demonstrate the intent to deal. (Tr. 24-25).

[5] On the date of the trial, March 18, 2003, the State moved to dismiss the battery and domestic battery charges that had been filed against Franklin.

Here, although Luper admitted that she had fabricated a portion of her original version of the events, on balance, Luper's testimony was not inherently improbable, and it was supported by circumstantial evidence through a police officer witness. The officer testified that he was among the officers serving the search warrant. He further testified that upon admission to the residence, they discovered Franklin at Luper's residence, they found marijuana plants in the computer center and in the detached garage, and they discovered other materials used to grow the plants in another room. Luper's initial statement to the police regarding the marijuana plants and the growing paraphernalia was substantially supported by the search of the residence. The incredible dubiosity rule is inapplicable here.

The trial court's judgment of conviction is affirmed.

KIRSCH, C.J., and RILEY, J., concur.